

## Torts: Mowry v. Badger State Mutual Casualty Co., 129 Wis. 2d 496 (1986)

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## NOTES

**TORTS**—*Mowry v. Badger State Mutual Casualty Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986).

In *Mowry v. Badger State Mutual Casualty Co.*,<sup>1</sup> the Wisconsin Supreme Court held that an insurance company which refused to settle an injured party's claim against its insured within policy limits did not act in bad faith and therefore was not liable for the excess judgment against its insured.<sup>2</sup> Crucial to its decision was the court's finding that the coverage question was a fairly debatable one.

In so ruling, the court declined to embrace the strict liability doctrine imposed on insurers in some jurisdictions.<sup>3</sup> The court reasoned that the adoption of this theory would force insurers to settle doubtful claims and thereby contravene Wisconsin's bifurcation statute,<sup>4</sup> which allows the issue of coverage to be determined before issues of liability and damages are

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1. 129 Wis. 2d 496, 385 N.W.2d 171 (1986).

2. *Id.* at 526, 385 N.W.2d at 185. The court also held that Badger State did not breach its duty to defend its insured. *Id.* at 527-30, 385 N.W.2d at 185-86. However, this issue is contractual in nature and will not be the focus of this note.

3. See generally Note, *Excess Liability of Insurers for Bad Faith Refusal to Settle: A Boon to the Individual Insured that Works to the Detriment of Consumers*, 18 SUFFOLK U.L. REV. 377, 385-87 (1984) (discussing a trend approaching strict liability).

4. WIS. STAT. § 803.04(2)(b) (1985-86) provides:

If an insurer is made a party defendant pursuant to this section and it appears at any time before or during the trial that there is or may be a cross issue between the insurer and the insured or any issue between any other person and the insurer involving the question of the insurer's liability if judgment should be rendered against the insured, the court may, upon motion of any defendant in the action, cause the person who may be liable upon such cross issue to be made a party defendant to the action and all the issues involved in the controversy determined in the trial of the action or any 3rd party may be impleaded as provided in § 803.05. Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting separate trials on the issue of liability to the plaintiff or other party seeking affirmative relief and on the issue of whether the insurance policy in question affords coverage. Any party may move for such separate trials and if the court orders separate trials it shall specify in its order the sequence in which such trials shall be conducted.

*Id.*

tried.<sup>5</sup> However, the import of *Mowry* is to force the consequences of an insurer's mistaken judgment on its insured.

This note will briefly trace the development of the tort of bad faith and then analyze the *Mowry* decision.

### I. STATEMENT OF THE CASE

Bradley Mowry was injured in an automobile collision while a passenger in a car driven by Steven McCarthy. McCarthy's parents were insured by Badger State. Their insurance coverage had policy limits of \$15,000 for damages to any one person and \$1,000 for medical coverage.

Mowry subsequently filed suit against McCarthy, McCarthy's parents, Badger State, and an insurance agent. Badger State responded with an answer which denied that McCarthy was covered by Badger State.<sup>6</sup> The parties agreed to a bifurcated trial during which the issue of coverage would be determined before any trial concerning the issue of liability.<sup>7</sup>

Before the coverage trial, Mowry extended numerous offers of settlement for the full policy limits to Badger State. Badger State, however, refused to agree to any settlement before the issue of coverage was tried. Ultimately, McCarthy was found by a jury to be covered under the Badger State policy. Judgment was entered accordingly in favor of Mowry and against Badger State for \$16,000 and against Steven McCarthy for \$175,000. Mowry, suing under McCarthy's assignment of rights, then brought an action against Badger State for bad faith and breach of contract.

The trial court found that Badger State breached its contract in refusing to defend McCarthy and that it committed bad faith in refusing to negotiate a settlement.<sup>8</sup> The court

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5. *Mowry*, 129 Wis. 2d at 514, 385 N.W.2d at 180.

6. The court stated:

[Badger State] believed that it was unclear whether McCarthy or his parents were the true owners of the automobile involved in the accident. Its investigation disclosed that the car was titled in McCarthy's mother's name, but that McCarthy had paid for the car with his own money, did not need permission to drive the car, and had told several people at the scene of the accident that he owned the vehicle and that it was uninsured.

*Mowry*, 129 Wis. 2d at 505, 385 N.W.2d at 176.

7. WIS. STAT. § 803.04(2)(b) (1985-86).

8. *Mowry*, 129 Wis. 2d at 508, 385 N.W.2d at 177. The trial court "was indignant that an insurer would delay settlement negotiations until the coverage issue has been

awarded Mowry damages in the amount of \$159,000.<sup>9</sup> Badger State appealed the trial court's decision, and on certification from the Wisconsin Court of Appeals,<sup>10</sup> the case proceeded to the Wisconsin Supreme Court. The Wisconsin Supreme Court reversed the trial court's decision, holding that Badger State neither breached its duty to defend nor acted in bad faith in failing to settle.<sup>11</sup> Consequently, Badger State was relieved of responsibility for the excess judgment entered against McCarthy.<sup>12</sup>

## II. BACKGROUND OF THE TORT OF BAD FAITH

In the early 1900's, courts were generally unwilling to force on the insurer a duty to settle on behalf of the insured.<sup>13</sup> The early courts' stance can be attributed, in part, to the fact that most standard policies were devoid of any express duty to settle.<sup>14</sup> This refusal of the courts to recognize a duty to settle was short-lived and gradually courts began to characterize the relationship between the insurer and insured as a fiduciary relationship, giving rise to an implied covenant of good faith and fair dealing.<sup>15</sup> Implicit in this approach was the recognition that a violation of this covenant could support a cause of action in tort.<sup>16</sup>

Presently, courts in several jurisdictions use varying standards to determine if an insurer has breached its duty to the insured in failing to settle a third-party claim.<sup>17</sup> The majority

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judicially determined, particularly when liability and excess damages are undisputed." *Id.*

9. *Id.*

10. WIS. STAT. § 809.61 (1985-86).

11. *Mowry*, 129 Wis. 2d at 530, 385 N.W.2d at 186.

12. *Id.* For an excellent discussion of damages resulting from an insurer's failure to settle and failure to defend, see Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1158-67 (1954).

13. Note, *supra* note 3, at 380.

14. *Id.*

15. Phelan, *The First Party Dilemma: Bad Faith or Bad Business?*, 34 DRAKE L. REV. 1031, 1033 (1985). The covenant of good faith and fair dealing provides that "neither party will do anything which injures the right of the other [party] to receive the benefits of the agreement." *Brown v. Superior Court*, 34 Cal. 2d 559, \_\_\_, 212 P.2d 878, 881 (1949).

16. Phelan, *supra* note 15, at 1033.

17. It is important to distinguish between third-party and first-party claims. Third-party claims generally involve situations where a third-party seeks compensation from

of courts maintain that an insurer owes its insured a duty of good faith, while a minority of courts examine the insurer's conduct towards its insured by employing a negligence standard.<sup>18</sup> Despite this lack of uniformity, courts in different jurisdictions agree that an insurer may be liable for a judgment against its insured in excess of policy limits when it unreasonably fails to settle a third-party claim within policy limits.<sup>19</sup>

In *Hilker v. Western Automobile Insurance Co.*,<sup>20</sup> the Wisconsin Supreme Court first recognized a cause of action arising from the bad faith conduct of an insurer. The *Hilker* court compared the insurer's duty to that of a fiduciary<sup>21</sup> and asserted that in a third-party claim situation, the insurer must exercise good faith in the investigation and settlement of a claim against its insured.<sup>22</sup>

Similarly, *Anderson v. Continental Insurance Co.*<sup>23</sup> also recognized the tort of bad faith. *Anderson*, however, broadened the scope of this newly-recognized tort to encompass

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the tortfeasor's insurer. First-party claims generally describe situations where the insured recovers benefits from his own insurer without establishing fault.

18. Note, *supra* note 3, at 382-85. Under the negligence standard, the insurer must use the degree of care in settling third-party claims that a reasonable insurer would exercise under the same or similar circumstances. *Id.* The distinction between the bad faith standard and the negligence standard has been minimized with the adoption of a dual standard by some courts. The dual standard requires that good faith be used in the decision to settle, but that ordinary care be used in the insurer's investigation of such a decision. Keeton, *supra* note 12, at 1141-42.

19. Phelan, *supra* note 15, at 1035.

20. 204 Wis. 1, 231 N.W. 257 (1930), *aff'd on rehearing*, 204 Wis. 1, 235 N.W. 413 (1931). For a discussion of the tort of insurer bad faith in Wisconsin, see Note, *Bad Faith - Tort Victim has No Cause of Action Against Tortfeasor's Insurer for Bad Faith Failure to Settle the Victim's Claim*, 65 MARQ. L. REV. 463 (1982). See also Kranzush v. Badger State Mut. Casualty Co., 103 Wis. 2d 56, 307 N.W.2d 256 (1981).

21. *Hilker*, 204 Wis. at 6, 231 N.W. at 259. See also Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

22. *Hilker*, 204 Wis. at 14-16, 235 N.W. at 414-15. The *Hilker* court found that the duty to act in good faith imposed two settlement-related obligations on the insurer. First, the insurer must "make a diligent effort to ascertain the facts upon which only an intelligent and a good faith judgment may be predicated." *Id.* at 15, 235 N.W. at 415. Second, the insurer must inform the insured when it becomes aware of the fact that recovery could exceed policy limits. *Id.* at 15-16, 235 N.W. at 415. A third obligation of the insurer to keep the insured timely and adequately informed of any offers of settlement and any negotiations was later added by the court in *Baker v. Northwestern Nat'l Casualty Co.*, 22 Wis. 2d 77, 83, 125 N.W.2d 370, 373 (1963). See also *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, \_\_\_, 319 P.2d 69, 75 (1957) (explaining factors to be considered in determining insurer's good faith settlement).

23. 85 Wis. 2d 675, 271 N.W.2d 368 (1978).

first-party claim situations. The court in *Anderson* reasoned: "The rationale which recognizes an ancillary duty on an insurance company to exercise good faith in the settlement of third-party claims is equally applicable and of equal importance when the insured seeks payment of legitimate damages from his own insurance company."<sup>24</sup> In addition, the court clarified some tangential issues by defining bad faith as an intentional tort<sup>25</sup> and distinguishing bad faith from a tortious breach of contract.<sup>26</sup>

### III. THE MOWRY OPINIONS

#### A. *The Majority*

Justice Ceci, writing for the majority, concluded that Badger State neither breached its contractual duty to defend nor committed bad faith in refusing to settle Mowry's claim within policy limits.<sup>27</sup> In reaching this decision, the court reasoned that because the duty to settle is dependent upon coverage, the duty to settle becomes doubtful when a coverage question arises.<sup>28</sup>

The court addressed the strict-liability approach adopted in a line of California cases relied on by Mowry to support his claim against Badger State.<sup>29</sup> The court, however, declared its unwillingness to adopt the theory which mandates holding an

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24. *Id.* at 688, 271 N.W.2d at 375.

25. *Id.* at 691, 271 N.W.2d at 376. The court stated that because bad faith is an intentional tort, punitive damages would be appropriate in certain circumstances. *Id.* at 697, 271 N.W.2d at 379. Traditionally, an insurer's breach of duty to settle a third-party claim exposed it to liability in the amount of the excess judgment against the insured; some courts have been allowing recovery beyond the excess judgment for mental suffering and punitive damages. Note, *supra* note 3, at 392.

26. *Anderson*, 85 Wis. 2d at 687, 271 N.W.2d at 374. The court had previously identified the bad faith conduct of an insurer as a "tortious breach of contract" in *Drake v. Milwaukee Mut. Ins. Co.*, 70 Wis. 2d 977, 983, 236 N.W.2d 204, 208 (1975).

27. *Mowry v. Badger State Mut. Casualty Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986).

28. *Id.* at 511, 385 N.W.2d at 178.

29. See *Luke v. Am. Family Mut. Ins. Co.*, 476 F.2d 1015 (8th Cir. 1972); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958) (establishing strict liability on the part of the insurer, regardless of good faith considerations). See generally Kircher, *Insurer's Mistaken Judgment — A New Tort?*, 59 MARQ. L. REV. 775 (1976) (discussing insurer bad faith in California).

insurer strictly liable for any judgment in excess of policy limits, regardless of good faith considerations.<sup>30</sup>

After rejecting a strict liability cause of action against insurers, the court analyzed what constitutes bad faith on the part of an insurer. Applying the standards of bad faith set forth in both *Anderson v. Continental Insurance Co.*,<sup>31</sup> a first-party claim case, and *Johnson v. American Family Mutual Insurance Co.*,<sup>32</sup> a third-party claim case, the court maintained that "[b]ad faith should be found in this case only if there was no fairly debatable coverage question."<sup>33</sup> Accordingly, the court ruled that Badger State was presented with a fairly debatable coverage issue and therefore did not commit bad faith in failing to settle Mowry's claims within policy limits.<sup>34</sup>

The court then turned to the question of whether Badger State breached its contract with McCarthy in refusing to defend him. The court stated that once the policy coverage issue was resolved, Badger State did in fact provide McCarthy with the defense it was required to provide.<sup>35</sup> According to the court, Badger State was not obligated to extend a free defense to McCarthy before resolving the coverage issue merely because the trial was bifurcated.<sup>36</sup> The court's determination that Badger State did not breach its duty to defend eliminated the need for any discussion of the appropriate measure of damages.<sup>37</sup>

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30. *Mowry*, 129 Wis. 2d at 514, 385 N.W.2d at 180.

31. 85 Wis. 2d 675, 271 N.W.2d 368 (1978). The court stated, "Under these tests of the torts of bad faith, an insurance company, however, may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis." *Id.* at 693, 271 N.W.2d at 377.

32. 93 Wis. 2d 633, 287 N.W.2d 729 (1980). The court here stated that it is not bad faith for an insurer to refuse to settle a victim's claim "under the bona fide belief that the insurer might defeat the action." *Id.* at 646, 287 N.W.2d at 736.

33. *Mowry*, 129 Wis. 2d at 517, 385 N.W.2d at 181.

34. *Id.* at 520-21, 385 N.W.2d at 182.

35. *Id.* at 527-30, 385 N.W.2d at 185-86. The duty to defend, unlike the duty to settle, is a contractual issue. The applicable clause in Badger State's policy provided, "[T]he company shall, with counsel of its choice, defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false, or fraudulent . . . ." *Id.* at 528, 385 N.W.2d at 185.

36. *Id.* at 529, 385 N.W.2d at 186.

37. *Id.*

### B. Justice Abrahamson's Dissent

Justice Abrahamson dissented, stating several policy arguments to support her contention that the insurer, not the insured, should bear the loss resulting from the insurer's decision not to settle within policy limits.<sup>38</sup> Justice Abrahamson noted that while Badger State's decision may not have been made in bad faith, it was still an erroneous one subjecting the insured to risk of loss.<sup>39</sup>

To further buttress her argument, Justice Abrahamson noted that the insurer is often in a better position than the insured to pay. Furthermore, the insurer can protect itself from liability in excess of policy limits by litigating the issue of coverage promptly, before a settlement offer is made.<sup>40</sup>

Additionally, Justice Abrahamson argued for the governance of basic contract principles.<sup>41</sup> She stated that Badger State actually had an insurance contract with McCarthy, and its refusal to pay based on its belief that no coverage existed should accordingly be viewed as a breach of contract.<sup>42</sup> Based on this rationale, Badger State should be required to pay the necessary damages to place its insured in the same position he would have been in had the insurance company performed its part of the insurance contract.<sup>43</sup>

### C. Justice Steinmetz's Concurrence

Justice Steinmetz, in a concurring opinion, emphatically stated that the duty to settle is not a contractual duty, but rather a fiduciary one.<sup>44</sup> Justice Steinmetz asserted that this duty arises only when the insurer assumes the exclusive management and control of its insured's defense.<sup>45</sup> Consequently, because Badger State did not assume McCarthy's defense un-

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38. *Id.* at 537-41, 385 N.W.2d at 189-90 (Abrahamson, J., dissenting).

39. *Id.* at 538, 385 N.W.2d at 190.

40. *Id.* at 540-41, 385 N.W.2d at 190-91.

41. *Id.* at 539, 385 N.W.2d at 190.

42. *Id.*

43. *Id.*

44. *Id.* at 530-37, 385 N.W.2d at 186-89 (Steinmetz, J., concurring).

45. *Id.* at 532-35, 385 N.W.2d at 187-88 (citing *Hilker v. Western Auto. Ins. Co.*, 204 Wis. 1, 13-14, 235 N.W. 413, 414 (1931); *Howard v. State Farm Mut. Auto. Ins. Co.*, 60 Wis. 2d 224, 227, 208 N.W.2d 442, 443 (1973)).



til after the coverage trial, the duty to settle was never triggered.<sup>46</sup>

Justice Steinmetz also refuted the dissent's assertion that the insured cannot adequately protect his own interests when the insurer refuses to defend.<sup>47</sup> Instead, he maintained that when an insurer refuses to defend, the insured possesses the authority to reasonably settle his own claim.<sup>48</sup> Justice Steinmetz further noted that because the insured in the case at bar did not mitigate his damages by negotiating a settlement himself, he would not be entitled to recover any excess judgment from Badger State.<sup>49</sup>

#### IV. CRITIQUE

Although the Wisconsin Supreme Court in *Mowry v. Badger State Mutual Casualty Co.*<sup>50</sup> did not deviate from established Wisconsin case law, it disregarded grave policy concerns likely to arise in the wake of this decision. As Justice Abrahamson noted in her dissent, the court in *Mowry* failed to recognize that an insurer's decision, though apparently lacking in bad faith motivation, may nevertheless be an erroneous one.<sup>51</sup>

The court neglected to justify the inequity of forcing the loss resulting from an insurer's erroneous decision on the insured. Because this case addresses a previously uncharted area of insurance law,<sup>52</sup> the court should have more thoroughly contemplated the likely impact of its decision on the

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46. *Mowry*, 129 Wis. 2d at 535, 385 N.W.2d at 188 (Steinmetz, J., concurring).

47. *Id.* at 535, 385 N.W.2d at 188-89.

48. *Id.* at 535-37, 385 N.W.2d at 188-89 (citing *United States Guar. Co. v. Liberty Mut. Ins. Co.*, 244 Wis. 317, 321, 12 N.W.2d 59, 60-61 (1943)).

49. *Mowry*, 129 Wis. 2d at 536, 385 N.W.2d at 189 (Steinmetz, J., concurring). Justice Steinmetz concluded his concurring opinion with his belief that *Mowry* knew that he could only recover full compensation for his injuries if McCarthy had a bad faith claim against Badger State. *Id.* at 537, 385 N.W.2d at 189. Therefore, *Mowry* tried to settle only with Badger State and not with the insured because he knew Badger State would not settle before the coverage trial. *Id.*

50. 129 Wis. 2d 496, 385 N.W.2d 171 (1986).

51. Justice Abrahamson noted this point in her dissent. *Id.* at 538, 385 N.W.2d at 190 (Abrahamson, J., dissenting).

52. Prior cases in this area have not dealt with an insurer rejecting settlement offers because of a coverage question. The court in *Mowry* stated, "[t]he [appellate] court noted that this particular scenario presents an unaddressed area of insurance law in this state." 129 Wis. 2d at 508, 385 N.W.2d at 177.

insured. First, the outcome of *Mowry* does not comport with the everyday understanding of insurance. As Justice Abrahamson stated, "[t]he policyholder buys insurance to avoid the risk of loss."<sup>53</sup> However, with *Mowry* as precedent, every policyholder will be exposed to the risk of an excess judgment resulting from an insurer's erroneous decision not to settle. Second, in light of this decision, it would not be surprising if policyholders try to protect themselves by purchasing more expensive coverage with higher policy limits.

The implications of *Mowry* would be less troubling had the majority given equal deference to the competing interests of both the insurer and insured. Instead, the court engaged in a rather one-sided analysis, giving disproportionate weight to the interests of the insurer. For example, in declaring its refusal to adopt California's theory of strict liability, the court explained, "[s]uch a policy is unduly oppressive on insurance companies and would force them to settle claims where coverage may be dubious."<sup>54</sup> However, the court did not explain how the strict liability doctrine could protect the insured and why the insurer's interests should supersede the insured's interests.

Alternatively, the dissenting opinion embodies the considerations that should have been included in the majority's analysis. In her dissent, Justice Abrahamson recognized that Badger State's decision, even if not made in bad faith, was still an erroneous one which would impose a loss on one of the parties.<sup>55</sup> She noted the apparent injustice of forcing this burden on either party; thus, she stated that fairness dictates that a determination then be made of which party is in a better position to bear the loss.<sup>56</sup> Unlike the majority, Justice Abrahamson considered the interests of both the insurer and in-

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53. *Id.* at 538, 385 N.W.2d at 190 (Abrahamson, J., dissenting). In *Barrera v. State Farm Mut. Auto. Ins. Co.*, 71 Cal. 2d 659, 669, 456 P.2d 674, 682, 79 Cal. Rptr. 106, 114 (1969), the court stated, "[t]he reasonable expectation of both the public and the insured is that the insurer will duly perform its basic commitment: to provide insurance."

54. *Mowry*, 129 Wis. 2d at 514, 385 N.W.2d at 180. *But see* *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 500, 323 A.2d 495, 510 (1974) (explaining that a strict liability approach would best protect the insured).

55. *Mowry*, 129 Wis. 2d at 538, 385 N.W.2d at 190 (Abrahamson, J., dissenting).

56. *Id.* at 538-40, 385 N.W.2d at 190-91.

sured in arriving at her ultimate decision that the insurer should shoulder this responsibility.<sup>57</sup>

Justice Steinmetz, in a fairly thorough opinion, correctly asserted that the duty to settle is not a contractual duty, as the dissent claimed, but rather a fiduciary duty.<sup>58</sup> Justice Steinmetz explained that this fiduciary duty arises only when the insurer undertakes the management and control of the insured's case.<sup>59</sup> Contrary to Justice Steinmetz's adamant belief that this duty never arose on the part of Badger State,<sup>60</sup> the record in *Mowry* indicates that the issue is at least debatable. The evidence in *Mowry* reflects a fairly high degree of involvement by Badger State. Badger State thoroughly investigated the case, participated in the decision to hold a bifurcated trial, and received and responded to offers of settlement.<sup>61</sup>

Justice Steinmetz further noted that the insured must protect his interests by negotiating a settlement himself.<sup>62</sup> However, it seems unlikely that an insured can adequately protect his interests when the distinction between his duties and the insurer's duties becomes blurred. In *Mowry*, Badger State monitored and participated in the defense of the claim, and yet its insured, probably not as familiar with the case, was expected to know that it was his duty to accept a settlement from the injured party.

Finally, the court seemed to place undue emphasis on Wisconsin's bifurcation statute<sup>63</sup> to support its position. Indeed, the court maintained that the California approach would be unacceptable in light of this statute.<sup>64</sup> While the statute may protect an insurer from being pressured to settle a claim where coverage is uncertain, the statute does not ameliorate the harshness of a judgment in excess of policy limits against the insured when the insurer is wrong.

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57. *Id.*

58. *Id.* at 530-37, 385 N.W.2d at 186-89 (Steinmetz, J., concurring).

59. *Id.* at 532-35, 385 N.W.2d at 187-88.

60. *Id.* at 535, 385 N.W.2d at 188.

61. *Id.* at 505-08, 385 N.W.2d at 176-77.

62. *Id.* at 535, 385 N.W.2d at 188-89. (Steinmetz, J., concurring). See Keeton, *supra* note 12, at 1153-58 for a discussion of the insured's duty to mitigate damages.

63. WIS. STAT. § 803.04(2)(b) (1985-86). See *supra* note 4 for the language of this statute.

64. *Mowry*, 129 Wis. 2d at 514, 385 N.W.2d at 180.

## V. CONCLUSION

While the majority's analysis of the bad faith issue in *Mowry v. Badger State Mutual Casualty Co.*<sup>65</sup> is in keeping with Wisconsin case law, the outcome of *Mowry* is an inequitable one. The rationale of *Mowry* mandates that an insured pay the consequences of an insurer's mistaken judgment. The insurer should be given the prerogative of not settling where coverage is doubtful,<sup>66</sup> but when the insurer is mistaken about coverage, the insurer, not the insured, should pay for any resulting loss.

Although the court recognized that imposing the loss on the insurer would produce some unfavorable repercussions in the insurance industry, the court neglected to likewise contemplate the implications of this decision on policyholders. *Mowry* is likely not only to confound policyholders' basic understanding of insurance, but also to make policyholders feel compelled to purchase insurance with higher limits. But even with higher limits in force, policyholders should feel insecure about the effectiveness of their coverage. As in *Mowry*, there always exists the possibility of being liable for an excess judgment due to an insurer's erroneous decision.

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65. 129 Wis. 2d 496, 385 N.W.2d 171 (1986).

66. WIS. STAT. § 803.04(2)(b) (1985-86) gives insurers this option.